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17 Attorneys for Plaintiff, Foster Poultry Farms

18 **UNITED STATES BANKRUPTCY COURT**  
19 **FOR THE EASTERN DISTRICT OF CALIFORNIA**  
20 **SACRAMENTO DIVISION**

21 In Re:

22 ZACKY FARMS, INC.,

23 Debtor.

24 FOSTER POULTRY FARMS,

25 Plaintiff,

26 v.

ZACKY FARMS, INC.,

Defendant.

Case No. 12-37961-TH

Chapter: 11

Adv. Pro. No.:

Adversary Proceeding Complaint

**COMPLAINT OF FOSTER POULTRY  
FARMS AGAINST ZACKY FARMS,  
LLC FOR BREACH OF CONTRACT  
AND UNFAIR COMPETITION**

1 Pursuant to 28 U.S.C. §§ 157(a), (b)(1), (c)(1) & 1334, and Rule 7001 *et seq.* of the  
2 Federal Rules of Bankruptcy Procedure, COMES NOW Plaintiff Foster Poultry Farms (“Foster  
3 Farms”) and for its causes of action against Debtor Zacky Farms, LLC (“Zacky Farms”) alleges  
4 and states as follows:

### 5 NATURE OF THE CASE

6 1. This action arises from Zacky Farms’ breach of two written agreements between  
7 the parties which govern the use of the “Zacky Farms” trademark.

8 2. In 2001, Foster Farms acquired the chicken-related assets of Zacky Farms in a  
9 complex, multi-million dollar transaction. As a key component of the deal, Zacky Farms agreed  
10 not to use the Zacky Farms trademark in conjunction with sales of chicken after the October 5,  
11 2001 closing. For the following eleven years, Zacky Farms honored the Purchase Agreement.  
12 Recently, however, Zacky Farms has breached the Purchase Agreement by offering chicken  
13 products for sale under the Zacky Farms trademark.

14 3. On October 26, 2012, Foster Farms through its counsel sent Zacky Farms a letter  
15 advising of the breach and demanding that Zacky Farms immediately cease use of the “Zacky  
16 Farms” name in conjunction with sales of chicken. Zacky Farms did not respond to the letter.

17 4. The actions of Zacky Farms not only breach the clear terms of the Purchase  
18 Agreement, but also constitute unfair competition, all resulting in irreparable injury to Foster  
19 Farms. Foster Farms brings this action to seek prompt redress for and injunctive relief against  
20 the ongoing wrongful actions of Zacky Farms.

### 21 JURISDICTION AND VENUE

22 5. On October 8, 2012, Zacky Farms voluntarily filed a bankruptcy petition under  
23 chapter 11 of title 11 of the United States Code, in the United States Bankruptcy Court for the  
24 Eastern District of California.

25 6. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1334 and 28  
26 U.S.C. §§ 157(a), (b)(1) and (c)(1), in that this action arises in or is related to a case under title

1 11 of the United States Code. This action is a non-core proceeding, and this Court has  
2 jurisdiction pursuant to 28 U.S.C. § 157(c)(1).

3 7. Venue lies properly in this judicial district pursuant to 28 U.S.C. § 1409(a).

4 **THE PARTIES**

5 8. Foster Farms is a California corporation whose principal place of business is  
6 located at 1000 Davis Street, Livingston, CA 95334. Foster Farms is a family-owned poultry  
7 manufacturing company that supplies fresh chicken, frozen chicken, turkey, fully cooked chicken  
8 and turkey, and other related products to retail customers located in California and elsewhere.  
9 Foster Poultry Farms is the successor in interest to all rights of Foster Farms, Inc.

10 9. Zacky Farms is a California corporation whose principal place of business is  
11 located at 2020 S. East Street, Fresno, CA, 93721. Since selling its chicken business to Foster  
12 Farms in 2001, Zacky Farms produces turkey products, including deli meats, whole turkeys, and  
13 turkey frankfurters.

14 **FACTUAL BACKGROUND**

15 **A. The Purchase Agreement**

16 10. On March 22, 2001, Zorro Leasing LLC, Fresno Farming LLC, and Foster Farms,  
17 Inc. (collectively “Purchasers”) and Zacky Farms, Zacky Foods, and A.B. AG Services, Inc.  
18 (collectively, “Sellers”) signed a Purchase Agreement whereby the Purchasers acquired the entire  
19 Zacky Farms chicken business from the Sellers. This business consisted of the growing,  
20 processing, distributing, and selling of chicken and chicken products. A true and correct copy of  
21 the Purchase Agreement and Schedules 1.1(b) and 2.2(i) to the Purchase Agreement, which refer  
22 to the relevant intellectual property, are attached hereto as Exhibit 1 and incorporated herein by  
23 reference.

24 11. Section 5.13 of the Purchase Agreement mandated that following the closing,  
25 Zacky Farms and its affiliates would not use, nor allow a third party to use, certain intellectual  
26 property listed in Schedule 2.2(i), including the “Zacky Farms” name.

1           12.     The Purchase Agreement did grant Purchasers, including Foster Farms, the  
2     limited and exclusive use of the "Zacky Farms" name for a duration of 36 months following the  
3     closing. *Id.* at § 5.13 and Schedule 1.1(b). However, given that the closing took place on  
4     October 5, 2001, this temporary license expired on October 5, 2004.

5           13.     After that date, under the Purchase Agreement neither Foster Farms nor Zacky  
6     Farms could use the "Zacky Farms" name in conjunction with their respective chicken  
7     businesses. Ex. 1 at § 5.13 and Schedule 2.2(i).

8     **B.     The Trademark License Agreement**

9           14.     Following the closing of the transaction on October 5, 2001, Zacky Farms, Zacky  
10    Foods, and A.B. AG Services, Inc. (collectively, "Licensors") and Zorro Leasing LLC, Fresno  
11    Farming LLC, and Foster Poultry Farms (collectively "Licensees") entered into a Trademark  
12    License Agreement which was aimed at facilitating the parties' respective use of the various  
13    trademarks impacted by the Purchase Agreement. A true and correct copy of the Trademark  
14    License Agreement is attached hereto as Exhibit 2 and incorporated herein by reference.

15          15.     Similar to the Purchase Agreement, the Trademark License provided that  
16    following the expiration of the temporary license period, neither Zacky Farms, as a Licensor, nor  
17    Foster Farms, as a Licensee, would have any further right to the Zacky Farms name for purposes  
18    of the production, sale or distribution of chicken products. Ex. 2 at §10.

19          16.     The Purchase Agreement, related Schedules 1.1(b) and 2.2(i), and Trademark  
20    License Agreement contain highly confidential information. As a result, Foster Farms is filing a  
21    request to seal these documents.

22     **C.     Zacky Farms' Violation of the Purchase and Trademark License Agreements**

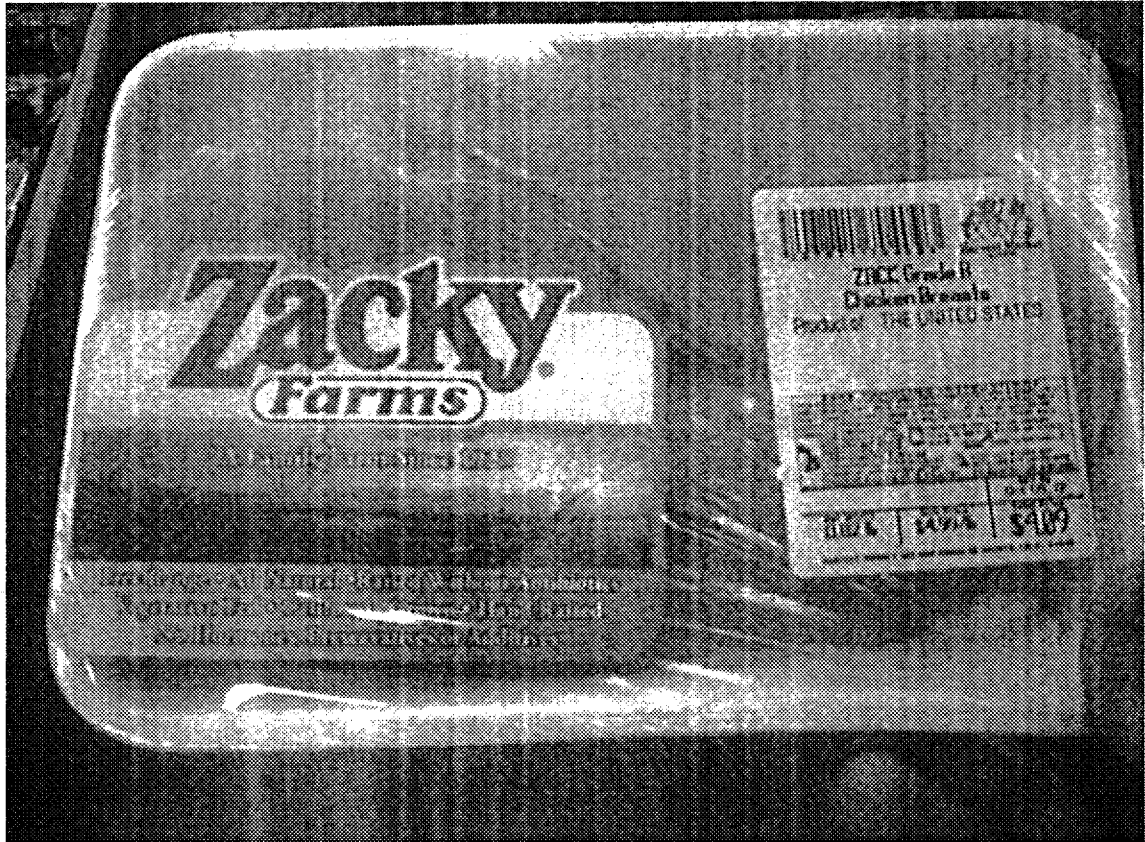
23          17.     Despite the clear terms of the Purchase and Trademark License Agreements,  
24    Zacky Farms recently has been involved in the sale of chicken products using the "Zacky Farms"  
25    name.  
26

1           18.     A true and accurate photograph of the cold case at a Vincente Foods store in West  
2 Los Angeles, California on October 12, 2012 shows Zacky Farms' unauthorized use of the  
3 "Zacky Farms" name on chicken products:  
4





1           19.     There is no question that the “Zacky Farms” trademark is affixed to chicken  
2 products as demonstrated in the following true and accurate close up photograph of packaged  
3 chicken identified at a Harvest Market store in Novato, California on October 4, 2012:



18  
19           20.     At the time that it sold its chicken business to Foster Farms in 2001, the “Zacky  
20 Farms” name was a recognized brand with a loyal customer base in the California chicken  
21 market. By deceptively using the “Zacky Farms” name, even though it forfeited the right to do  
22 so when it sold its chicken business, Zacky Farms is seeking a head-start in rebuilding its  
23 chicken business.

24           21.     As a result, Zacky Farms’ continued use of the “Zacky Farms” name places Foster  
25 Farms at a competitive disadvantage in that it no longer benefits from the goodwill and brand  
26 recognition that it bargained for when it acquired the Zacky Farms chicken business. It is

1 impossible to quantify the damage that the actions of Zacky Farms have caused and continue to  
2 cause Foster Farms.

3 22. Foster Farms provided Zacky Farms with notice of the breach in an October 26,  
4 2012 cease and desist letter. A true and correct copy of the October 26, 2012 letter is attached  
5 hereto as Exhibit 3 and incorporated herein by reference. In the letter, Foster Farms immediately  
6 demanded that Zacky Farms cease use of the "Zacky Farms" trademarks on chicken products.  
7 Zacky Farms did not respond to the letter, leaving Foster Farms with no choice but to protect its  
8 rights through this adversary proceeding.

9  
10 **FIRST CAUSE OF ACTION**  
**BREACH OF PURCHASE AGREEMENT**

11 23. Foster Farms incorporates as if fully set forth herein the allegations of Paragraphs  
12 1-22 above.

13 24. Foster Farms performed all conditions, covenants and promises required on its  
14 part to be performed in accordance with the terms and conditions of the Purchase Agreement.

15 25. By its actions, Zacky Farms has committed a material breach of the Purchase  
16 Agreement by selling chicken products affixed with the "Zacky Farms" trademark. As a result  
17 of the ongoing conduct of Zacky Farms, the breaches are recurring and continuous.

18 26. By its actions, Zacky Farms has also breached and continues to breach the implied  
19 covenant of good faith and fair dealing that is part of every contract under California law.

20 27. As a result of Zacky Farms' breach of the Purchase Agreement, Foster Farms has  
21 sustained irreparable harm for which there is no adequate remedy at law.

22 **SECOND CAUSE OF ACTION**  
**BREACH OF TRADEMARK LICENSE AGREEMENT**

23 28. Foster Farms incorporates as if fully set forth herein the allegations of Paragraphs  
24 1-27 above.

1           29. Foster Farms performed all conditions, covenants and promises required on its  
2 part to be performed in accordance with the terms and conditions of the Trademark License  
3 Agreement.

4           30. By its actions, Zacky Farms has committed a material breach of the Trademark  
5 License Agreement by selling chicken products affixed with the "Zacky Farms" trademark. As a  
6 result of the ongoing conduct of Zacky Farms, the breaches are recurring and continuous.

7           31. By its actions, Zacky Farms has also breached and continues to breach the implied  
8 covenant of good faith and fair dealing that is part of every contract under California law.

9           32. As a result of Zacky Farms' breach of the Trademark License Agreement, Foster  
10 Farms has sustained irreparable harm for which there is no adequate remedy at law.

11                                   **THIRD CAUSE OF ACTION**  
12                                   **UNFAIR COMPETITION**

13           33. Foster Farms incorporates in full the allegations of Paragraphs 1-32 above.

14           34. After selling its chicken business to Foster Farms in 2001, Zacky Farms forfeited  
15 the right to the "Zacky Farms" name for purposes of selling chicken products. Zacky Farms'  
16 acts of selling products affixed with the "Zacky Farms" trademark as prohibited by the Purchase  
17 and Trademark License Agreements are unlawful, unfair or fraudulent business acts or practices  
18 and, therefore, constitute unfair competition within the meaning of the Business and Professions  
19 Code §§ 17200, *et seq.*

20           35. Foster Farms has suffered injury in fact and has lost money or property as a result  
21 of Zacky Farms' unfair competition.

22                                   **PRAYER**

23           WHEREFORE, Foster Farms prays as follows:

24           1. That judgment be entered in favor of Foster Farms and against Zacky Farms for  
25 breach of the Purchase and Trademark License Agreements.

26           2. That the Court issue a preliminary and permanent injunction preventing Zacky  
Farms from selling chicken products under the "Zacky Farms" name.



1           3.       That judgment be entered in favor of Foster Farms and against Zacky Farms for  
2 unfair competition.

3           4.       That Zacky Farms be required to disgorge any revenues derived from its wrongful  
4 actions to the fullest extent permitted by law.

5           5.       Foster Farms' costs of suit herein, and other expenses and costs of litigation,  
6 including attorney's fees.

7           6.       Such other and further relief as the Court deems just, equitable and proper.

8 DATED: November 20, 2012

SEYFARTH SHAW LLP

9  
10 By: 

Alfred L. Sanderson, Jr.  
Ferry E. Lopez

11  
12 Attorneys for Plaintiff  
FOSTER POULTRY FARMS  
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# **EXHIBIT 1**

**is filed with Foster Poultry Farms' Request to Seal Documents**

## **EXHIBIT 2**

**is filed with Foster Poultry Farms' Request to Seal Documents**

**EXHIBIT 3**

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Direct Fax 202 263 5227  
czarlenga@mayerbrown.com

October 26, 2012

VIA FACSIMILE & FIRST-CLASS MAIL

Zacky Farms  
Attn: Robert Zacky and Richard Zacky  
2000 North Tyler Avenue  
South El Monte, California 91733  
Facsimile No.: (626) 401-4281

Skadden, Arps, Slate, Meagher & Flom LLP  
Attn: Jeffrey H. Cohen, Esq.  
300 South Grand Avenue  
Los Angeles, California 90071-3144  
Facsimile No.: (213) 687-5600

Re: Zacky Farms/Foster Farms

Dear Messrs. Zacky and Cohen:

This firm represents Foster Poultry Farms ("Foster Farms") in conjunction with Zacky Farms' breaches of certain agreements between Foster Farms and Zacky Farms. Specifically, it has come to the attention of Foster Farms that Zacky Farms has been selling chicken products using the "Zacky Farms" name. This is a violation of at least Section 5.13 of the March 22, 2001 Purchase Agreement between Foster Farms and Zacky Farms, which states in relevant part: "From and after the Closing, Sellers and Sellers' Affiliates will not, nor allow any third party to, use the Excluded Intellectual Property<sup>1</sup> in the production, sale, or distribution of any chicken product other than Ancillary Chicken Products." This activity is also a breach of Section 10 of the October 5, 2001, Trademark License Agreement between Zacky Farms and Foster Farms (among others), which states in relevant part: "Upon expiration of the License Period and the Sam's Club License Period, or upon the termination of the Trademark License, neither Licensees, Licensors nor any successor in interest shall have any further right to the Licensed

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<sup>1</sup> "Excluded Intellectual Property" is defined in the Purchase Agreement to include the "Zacky Farms" name, among others. See March 22, 2001, Purchase Agreement, Section 1.1.



Mayer Brown LLP

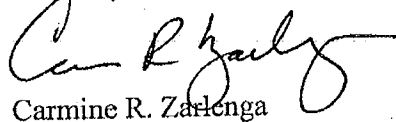
Zacky Farms  
Skadden, Arps, Slate, Meagher & Flom LLP  
October 26, 2012  
Page 2

Intellectual Property<sup>2</sup> in connection with the production, sale or distribution of chicken products other than the use by Licensors and any successor in interest with respect to the Ancillary Chicken Products and any non-chicken products.” Zacky Farms’ actions also constitute violations of the California Unfair Competition Law (California Business and Professions Code Sections 17200 *et seq.*).

Zacky Farms’ activities are in blatant disregard of Foster Farms’ rights, and will not be tolerated. Accordingly, Foster Farms demands that Zacky Farms immediately cease use of the “Zacky Farms” name in connection with the production, sale, and distribution of chicken products in violation of the Purchase Agreement and Trademark License Agreement, and confirm in writing to Foster Farms Zacky Farms’ cessation of same. In the event Zacky Farms does not confirm by November 5, 2012, Foster Farms will pursue all available remedies to the full extent permitted by law.

Foster Farms reserves all of its rights and waives none. Please feel free to contact us if you have any questions or would like to discuss further.

Sincerely,



Carmine R. Zarlenga

cc: Randall C. Boyce

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<sup>2</sup> “Licensed Intellectual Property” is defined to include the “Zacky Farms” name, among others. See March 22, 2001, Purchase Agreement, Section 1.1 and Schedule 1.1(b).